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“Protection of employees and creditors in cross – border mergers”

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Abstract

This dissertation was written for the purpose of fulfilling the academic requirements of my Master of Laws program in Transnational and European commercial law, Banking Law, Arbitration/Mediation at the International Hellenic University.

This dissertation will examine the ways in which mergers result in the creation of stronger and more prosperous entities, albeit they can often be incredibly intimidating for employees and are not free from disadvantages. It will further consider how mergers could potentially cause an increase in the liabilities of the merging companies. Also, the fact that the creditors of the merging entities do not have a veto right against a merger creates a need for a specific protection mechanism for the creditors. A merger may also negatively affect the employees of the merging entities, especially those of the absorbed company. The merging employers often have to do some sheathing in staffing, particularly within human resources, finance and accounting departments. In some cases, entire departments or divisions are made redundant. Mergers have been historically linked to massive layoffs.

Further to the above, this dissertation will also touch upon how “over-protection” may defeat the purpose of a merger therefore it will become apparent that a fairly balanced protection mechanism is essential it goes without saying that in every institution, employment law related issues are bound to arise. This dissertation will study the rights and obligations arising between the employer and its employees and consider how employees could continue to participate in the board of companies after the cross – border merger.

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Introduction

Cross-border mergers have become the dominant mode of growth for firms seeking competitive advantage in an increasingly complex and global business economy. They can be the most effective and efficient way to enter a new market, add a new product line or increase distribution reach.¹

Allowing for global industrial restructuring and efficiency gains, cross-border mergers can yield dividends in terms of company performance and profits. The extent to which they result in benefits for home and host countries is argued to be strongly influenced by policy frameworks.² Mergers are more strategically motivated than in the past.³ Yet in many legal systems cross-border mergers are not explicitly regulated. For the European Union that changed. The European Commission proposed a draft directive on cross border mergers in November 2003 and since its controversial aspects, which have hindered previous drafts for three decades, have now been resolved.

Among the issues dealt with in that directive, employee's protection, more than creditors' one, shows up to have a major role to play.

The cross-border merger could have major consequences on the worker rights of the businesses undergoing this method. The staff notice themselves before two uncertainties. The primary one regards the continuity of the collective agreement below the rights that have been obtained before the merger, with regard to that the EU law maker adopted Directive 2001/23/CE on the approximation of the laws of the Member States referring to the safeguarding of employees' rights within the event of transfers of undertakings, businesses or components of undertakings or businesses.⁴ The second refers to maintaining the worker participation right to the

¹ "Mergers and acquisitions from A to Z", Andrew J. Sherman, Milledge A. Hart, pp. 13

² "Advances in mergers and acquisitions" Cary L. Cooper, Sydney Finkelstein

³ "Mergers and acquisitions from A to Z", Andrew J. Sherman, Milledge A. Hart, pp. 13

⁴ Regarding the employee participation rights, see U. Veersma, S. Swinkels - Transfer: In European Review of Labour and Research Participation in European Companies: views from social partners in three Member States Volume 11, 2005 pp. 189-205; F. Bejan, "European Union Rules on employee participation right within the framework of cross-border merger.", Advances in fiscal, political and law sciences, Proceedings of the 2nd International Conference on Economics, Political and Law Science (EPLS '13), pp 43-49.

administration and direction of corporations, wherever they exist, within the company that ensuing from the cross-border fusion method, right protected at European level through article sixteen of the Directive 2005/56/EC on cross-border mergers of financial obligation corporations, completed with Regulation(EC) 2157/2001 within the Statute for a European company and with Directive 2001/86/EC supplementing the Statute for a European company with relation to the involvement of worker and which now has now been replaced by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law. The worker participation rights in ensuing corporations from a cross-border merger and therefore the manner they're negotiated, are aspects of importance in influencing the make decision method relating to control or not such reorganization. This dissertation aims firstly to analyze the legal framework provided by the European norms on the negotiation of participation rights of staff within the event of a cross-border merger, and on the protection of creditors, secondly to emphasize that the aspects with relation to this issues of the regulation needs to be changed and thirdly to propose the lege ferenda amendments.⁵

From the opposite hand, as all assets and liabilities are being transferred, legal mergers could make risks for creditors of the disappearing company once the liabilities of the new created company exceed the assets of the disappearing company or for creditors of the new created company once the liabilities of the disappearing company exceed the assets of the new created company.⁶ Therefore, lenders protection has to be safeguarded in legal mergers. And that's why company type defines the pool of assets that bond all corporate contracts. Completely different national systems of lender protection could also be associate impediment for a sleek merger method and will produce uncertainties. The question thus is whether or not lenders' protection will so best be left to the Member States.

⁵ "Employee participation rights negotiation in companies resulting from a cross – border merger", Felicia Bejan

⁶ B. Keller, The European Company statute-employee involvement-and beyond, in Industrial Relations Journal, Vol. 33, no. 5, 2002, ppp. 424–445

Before we thoroughly analyze the above issues, we must first understand the basic concepts that are really necessary for the study of the directives and especially for the above issues.

Chapter 1st : Theoretical background for understanding legal terms and the process of a merger.

1. The definition of a cross –border merger.

Merger is a combination of two or more companies in which the assets and liabilities of the selling firm(s) are absorbed by the buying firm. Although the buying firm may be a considerably different organization after the merger, it retains its original identity. ⁷ Consequently, an EU cross-border merger is the coming together ("merger") of two or more companies (or partnerships) which are incorporated in at least two EU member states. EU cross-border mergers are regulated by the 2005 European Directive on Cross-Border Mergers of Limited Liability Companies, which is transposed by EU member states into national law and which has now been replaced by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law.

The three kinds of cross-border merger that may be pursued by the parties ⁸: 1) Merger by absorption - by that the takeover target is "absorbed" by transferring all its assets and liabilities to the new created company. The target is then dissolved while not going into liquidation, 2) A merger by absorption of a completely in hand subsidiary - wherever the target may be a wholly-owned subsidiary, wherever the target is dissolved and when dissolution the assets and liabilities of the target are transferred to the party. There are fewer formal necessities that require to be completed during this form of merger. 3) Merger with the formation of a brand new company - with that two or additional corporations (the transferors) transfer every of their assets and liabilities to a fresh created third corporation - company (the transferee). Once the transfer has been completed, the two transfer corporations are dissolved while not being liquidated.⁹

⁷ "Mergers and acquisitions from A to Z", Andrew J. Sherman, Milledge A. Hart

⁸ Donald M. DePamphilis, "Mergers, Acquisitions, and other Restructuring Activities", Fifth edition, Academic Press, pp.649-650

⁹ Ibid

2. The definition of the employee.

An employee is an individual who works part-time or full-time under a contract of employment, whether oral or written, express or implied, and has recognized rights and duties. Also called worker. An employee is one whose work is a personal mercenary product and requires appropriate training, experience and accountability.¹⁰

3. The definition of the creditor.

The creditor provides credit, giving other persons the possibility to borrow money which they will return at a future date. Creditors can be divided into personal and real. Personal creditors are people who lend money to friends and relatives. Real creditors, such as banks, have legal contracts with debtors who guarantee that the lender has a right of claim on the debtor's assets if the lender fails to repay his loan¹¹.

These three concepts above are directly related to each other. Interact and affect each other directly, because in order to complete a merger, it is considered necessary to involve both creditors and employees with different rights each.

4. The merger's process.

From the "absorbed" company's point of view, the key to the process is preparation, regardless of motivation for absorption. This means taking all the necessary steps to prepare the company for the absorption from a corporate house – keeping perspective. A strategy meeting of the members of the company's team is more than necessary in order to identify the financial and structural goals of the transaction, develop an action plan and timetable, understand the current market dynamics and potential pricing range for the business, identify the potential legal and

¹⁰ "Labor Law", Dimitrios Zerdelis, Athens-Thessaloniki, 2013

¹¹ Ibid

financial hurdles to a successful transaction and outline and draft the offering memorandum and develop a definitive “to do” list in connection with corporate house-keeping matters, such as preparation of board and shareholder minutes and maintenance of regulatory filings.¹² An action plan is a natural outcome of the meeting with the deal team. It is important to be realistic about the investment required and the expected amount of time required to complete a transaction. While some deals are completed within 60-90 days, is more common for the sales process it take approximately six months. The length of the merger method can rely upon varied factors; as well as whether or not the staff of the corporate have the proper to participate within the decision-making. ¹³If the staff doesn't have this right, the method will take more or less six months to finish. However, if the staff are entitled to the present right underneath the Regulation, the method might take longer. So, an action plan can help ensure that the process runs smoothly, and should outline the list of deal milestones and expected completion dates.¹⁴ For example, in the UK there's no automatic right to worker participation at board level; these arrangements is also introduced voluntarily by UK corporations. Wherever the company has an existing system of worker participation, this should be preserved by the company once the merger. The obligatory worker participation provisions contained within the laws also will apply to transferee corporations with over five hundred staff or an existing system of worker participation. ¹⁵On completion, assets and liabilities of the transferer company are transferred to the transferee company. The transferer company is then dissolved with no need to travel into liquidation and can be struck-off the register of corporations.

¹² Kevin K. Boeh, Paul W. Beamish, *Mergers and Acquistiins*, Text and Cases, Sage, pp.401-403

¹³ “Mergers and acquisitions from A to Z”, Andrew J. Sherman, Milledge A. Hart, pp. 25-27

¹⁴ Ibid, pp.25-27

¹⁵ “What is a Cross-Border Merger?”, article, July 2018, By Samantha Billingham, lawyer

Chapter 2nd : The Directive 2005/56/EC on cross-border mergers of limited liability companies – A general overview of the directive.

Romanian stakeholder stated:

“The Directive has clarified the availability of, and has provided the framework for, the cross-border merger. Before the implementation of the Directive under Romanian law, we have been involved in an operation aimed to achieve effects similar to a cross-border merger, which has taken two years to study, approve and prepare for implementation.”¹⁶

The purpose of the Directive on cross-border mergers is encouraging participation and combination between constrained obligation companies from distinctive Member States within the European Union by taking absent administrative and regulatory challenges that they experienced when executing a cross-border merger. In see of the completion and working of the single market, the Directive lays down arrangements to encourage such mergers.¹⁷

Directive 2005/56/EC was slow and entered into force on fifteen Dec 2005 by providing a particular legal framework for cross-border mergers of financial obligation corporations (Cross-Border Mergers Directive - CBMD, or Tenth Council Directive). The CBMD is usually regarded in a very positive manner. It harmonized the cross-border mergers of financial obligation corporations by EU (European Union) and EEA (European Economic Area) Member States and provided a standard framework facilitating cross-border mergers. ¹⁸A lot of specifically, it enacted all EU and EEA Member States to allow cross-border mergers of financial obligation corporations and established a lot of predictable and structured framework for cross-border mergers, increasing legal security, which is important for advanced transactions. It provides legal certainty as once the merger is approved by the competent authority in a Member

¹⁶ Bech Bruun/Lexidale, Study on the application of the Cross-Border Mergers Directive, pp.40

¹⁷ Article, “Creditor protection in cross – border mergers; unfinished business”, Utrecht Law Review, Ceert T.M.J Raaijmakers & Thijs.PP.H Olthoff

¹⁸ Article “Cross- Border Mergers”, Dillon – Eustace Law firm, Matthew Ryan/Adrian Benson, June 2012

State.¹⁹ As a result, since the implementation of the CBMD, an increasing variety of corporations have completed cross-border mergers. However, obstacles to cross-border mergers relating to issues with the CBMD are highlighted under various studies, namely: i) the scope of the CBMD framework, particularly the very fact that it solely covers financial obligation corporations and only corporations that are ready to merge under national law, ii) the incompatibility and divergence within the national protection regimes for the protection of stakeholders (creditors, minority shareholders and employees) and iii) procedural and logical obstacles. These obstacles may well be overcome by a revision of the CBMD addressing one or a lot of the subsequent issues: extending the scope of the CBMD to incorporate all legal entities among the that means of Article 54 TFEU;²⁰ additional harmonization of the rules on protection (possibly with the introduction of an ex-post protection system which might not delay the merger); additional harmonizing minority stockholder protection (possibly with the award of an exit right against adequate compensation and a right to receive extra compensation just in case of an inadequate exchange ratio); by introducing exemptions to the requirement of a merger report; harmonization of the rules on the accounting date and on valuation; streamlining documentation and communication between competent national authorities. An additional evaluation of the rules on worker protection be helpful if politically possible.²¹

Today, the CBMD has been replaced by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law. Moreover, a proposal for a new directive, which is already in the process of being approved to be implemented, will supplement and correct the current guidelines on EU organization law that are presently systematized in Directive (EU) 2017/1132.

¹⁹ Ibid

²⁰ Ex post analysis of the EU framework in the area of cross border mergers and divisions, European Implement Assessment, Study, December 2016, pp. 46

²¹ Ibid,

Chapter 3rd : Employee Participation in European Companies and their protection in cross - border mergers

The notion of employee participation refers to the influence of employees on the corporate decision-making process within companies. The employee participation has to do with the influence of the body representative of the workers and/or the employees' representatives within the affairs of a corporation by method of appointing a number of the members of the company's superior or organic body, suggesting and/or opposing the appointment of some or all of the members of the company's superior or organic body.

1. Article 2(k) of Directive 2001/86/EC on Employee Participation in European Companies.

Specifically, and in keeping with Article 2(k) of Directive 2001/86/EC on worker Participation in European companies²², "participation" designates that the influence of the staff representatives within the affairs of an organization by way of: a) electing or appointing a number of the members of the company's superior or organic body, or b) advocating the appointment of some or all of the members of the company's superior or organic body. EU and EEA Member States have terribly completely different traditions with respect to worker participation. In some Member States, for example, worker participation is mandatory by law, whereas in others there's no regulation on the matter.²³

In nineteen (19) out of thirty (30) EU/EEA Member States, staff have a right to participate in the management or superior board of corporations by virtue of national law.²⁴ Withal, worker participation systems and necessities vary considerably and there are several different parameters to take into consideration: the nature of the corporation as a public and private sector entity, the minimum size of the corporation

²² Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, [2001] – (SE)

²³ Bech Bruun/Lexidale, Study on the application of the Cross-Border Mergers Directive, pp.74

²⁴ Ibid, pp.70

(e.g. no minimum size or a threshold which may vary from twenty five to over five hundred employees), the rights of participation that staff are entitled (a seat in the management board or the superior board of the corporation depending on the governance structure followed by the Member State), the amount and responsibilities of the representatives and therefore the method of their appointment.²⁵

However, the above is not the only way in which employee participation varies among the Member States. It also varies in terms of the minimum number of the employee representatives required in the company. In a few Member States, for example, there's minimum number of the employee representatives required (such as for Austrian Plcs). In others, minimum number applies, which can vary from 25 to more than 500 employees.²⁶

The level of participation representatives get also varies: a seat in the administration board of companies. This depends on the corporate administration structure within the Member States, which is generally a monistic demonstrate (single board) or a dualist demonstrate (administration board and supervisory board). Inside the board structures, an encouraging difference can be found within the number of board-level representative agents, shifting between 1 representatives to half of the board. The duties of the board individuals can also vary, which in turn affects the diverse degrees of impact representative agents can have. At last, the method of appointment and the rules with respect to potential candidates vary broadly among Member States.²⁷

Because of these contrasts between the Member States, prior to the implementation of the Directive, stakeholders dreaded that cross-border mergers would permit companies to diminish the levels of employee participation to serve their own interests. This seems to be the case in the off chance that a German company which has been consolidated into a company from the United Kingdom. In case, UK law would applies to the successor company, there would be no representative agents sitting in the supervisory board, as was required up until recently by German Law. *This issue is additionally regarded as one of the most significant obstacle in making a cross-*

²⁵ Bech Bruun/Lexidale, Study on the application of the Cross-Border Mergers Directive, pp.71

²⁶ Ibid, pp. 75

²⁷ Ibid, pp. 75

border merger to begin with. After much debate about this subject in 2001, when the SE Regulation²⁸ was sanctioned, a sustainable solution was found and put into law within the SE Directive. The solution was that, subject to certain requirements, *the administration would liaise with the workers to determine the level of participation of the representatives within the successor company and that standard rules would apply in deciding the appropriate representative.*²⁹ This solution was moreover received by the Directive³⁰, but with few amendments.

2. The need to reach a compromise between Member States.

As already indicated, and with a read to reaching a compromise between these Member State variations in procedures and culture, the directive for cross-border mergers (CBMD), which was entered into force on fifteen Dec 2005, enacted a system supported the model of worker participation within the SE Regulation however with some modifications. Specifically, the overall rule of Article sixteen (16) of the CBMD provides that the principles on worker participation shall follow the laws of the Member State wherever the enlisted working environment of the company resulting from the merger is settled.³¹

Since this might cause a major deterioration of the associated participation rights of the workers, which operates as an incentive for researching its impact, Article 16(2) of the CBMD provides for three special exceptions. The primary one is that the national rules don't apply if, for the preceding 6 months to supplementing the Statute for a European company with relevancy the involvement of staff, a mean of quite five hundred staff was in operation below associate worker participation system in one or additional of the merging firms. The second exception offers that the national rules of the registered workplace don't apply if the corporate ensuing from the cross-border merger doesn't provide for the identical level of worker participation as operated

²⁸ Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, [2001] – (SE)

²⁹ Bech Bruun/Lexidale, Study on the application of the Cross-Border Mergers Directive, pp.75

³⁰ The Directive 2005/56/EC on cross-border mergers of limited liability companies.

³¹ Ex post analysis of the EU framework in the area of cross border mergers and divisions, European Implement Assessment, Study, December 2016, pp. 44

within the relevant merging firms. Article 16(2)(c) provides in impact for the third exception, that applies once the national law applicable to the corporation produced from the cross-border merger doesn't offer the identical level of worker participation title to employees located within the Member State of the ensuing company compared to staff of institutions set during a completely different Member State.³²

If any of the above exceptions applies, the management will discuss with the staff the shape of employee participation within the successor firms applying the standard rules. Article 16(3) regulates this procedure by relating the SE Directive³³. Under the CBMD, the limit for the utilization of the standard tenets was expanded from 25 to 33.3 percent and the significant organization organs can likewise make the standard tenets promptly pertinent.

This framework is being taken into account as possible, though there are considerations that it's *excessively complicated* and *incomprehensible* which entails that there are issues to be addressed, namely: the final employee participation agreement could take months to include, that is tough to reconcile with national legislation, as is clearly the case of the Austrian provision requiring the registration of the cross-border merger inside 9 months of the effective date of the merger;³⁴ moreover, there's ambiguity on the exceptions of Article 16 (2) CBMD and on the sanction for non-conformity with the worker participation rules. To boot, in contrast to the SE Regulation, the CBMD doesn't embrace provisions on data and consultation within the worker protection framework.³⁵

Notably, for example, stakeholders in Germany have highlighted that the problem of worker participation is one of the most common and important issues in the merger process, one that could potentially be an obstacle to the conclusion of the cross-border merger³⁶. Greece has additionally reportable that a merger between a Greek listed company and a Spanish company had to be stopped due to worker participation

³² Bech Bruun/Lexidale, Study on the application of the Cross-Border Mergers Directive, pp. 113

³³ Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, [2001]

³⁴ Ibid, explaining that respective complaints have been expressed by legal advisors from 14 Member States.

³⁵ Bech Bruun/Lexidale, Study on the application of the Cross-Border Mergers Directive, pp. 74

³⁶ Bech Bruun/Lexidale, Study on the application of the Cross-Border Mergers Directive, pp.197

problems. Complaints regarding the worker participation procedure have also been brought by stakeholders in Italy, in relation to a specific cross-border merger of associate Italian and German company.³⁷

A similar issue is also reported in the Austrian context. The Austrian legislation transposing the rules on employee participation is so broadly interpreted that it also covers cases where no employee participation rights existed in the company being acquired. The example given was the following: If a foreign SPV that does not have employees and therefore is not operating any employee participation system is merged into an Austrian company, a procedure similar to the procedure for SEs will then be triggered. Employee representatives from the Austrian company's European subsidiaries may be delegated to the Austrian company's supervisory board (Aufsichtsrat). The result is astonishing: on the one hand, there are no employees of the company being acquired (SPV) and therefore no participation rights to be protected. On the other hand, the Austrian employee representatives already sitting on the supervisory board usually have no interest in being diluted by employee representatives from the company's European subsidiaries. Further, if the Austrian company does not already have a supervisory board, it will be required to establish one, even if there is otherwise no need for it.³⁸

Proposals for amendments to the above mentioned framework vary considerably. One approach proposes amendments aiming at a high level of worker participation (e.g. within the sort of decreasing the share of application of the quality rules from thirty 33 % to twenty 25 % in alignment with the SE Directive). The other approach is the mobility-friendly approach. This proposes the introduction of an additional slender set of conditions to worker participation by decreasing the procedural burden of a merger and also the time it takes to cause a merger.³⁹

It has also been criticized that Article 16 has to do only with participation and not with data obligations. In rule, the European Works Committee Directive does not apply

³⁷ Ex post analysis of the EU framework in the area of cross border mergers and divisions, European Implement Assessment, Study, December 2016, pp. 44

³⁸ Bech Bruun/Lexidale, Study on the application of the Cross-Border Mergers Directive, pp.77-78

³⁹ Ex post analysis of the EU framework in the area of cross border mergers and divisions, European Implement Assessment, Study, December 2016, pp. 46

to SEs. It was expressed that in cases where both works committee and employee participation issues were present could end up being complicated. In cases where a few different rules are applicable in the event that there's no coordination in this respect, this might lead to parallel application of different methods in order to ensure that all the rules have been complied with.⁴⁰

However, the very fact that Article 16 CBMD was the results of a really fragile compromise, means that attention ought to be paid to the third proposal that a reform of the CBMD ought to refrain from amending communication worker participation provisions.⁴¹ Notable ambiguities in need of clarification relate to the purpose of Article 16(2) or the problem of sanctions for non-compliance, to the extent an agreement appears realistically possible. Such clarifications might be expected to have a useful impact on the application of the worker participation rules and therefore on the exercise of employee participation rights.

3. Ar. 16 (employee participation) of the cross border merger Directive 2005/56/EC on cross-border mergers of limited liability companies.

Article sixteen (16) of the CBMD introduced a far desired compromise answer. Article 16 of CBMD provides that the rules on employee participation shall follow the national laws of the Member state where the registered office of the company resulting from the merger is situated.

This requires that under specific circumstances the management will discuss with the employees the form of worker participation within the successor company; otherwise certain commonplace rules will be applied. This solution is modelled once the SE Directive 86⁴² didn't cover this issue: under the CBMD, the appliance of the pattern rules was inflated from 25 to 33.3 per cent. Firms and practitioners have worked with these rules of the CBMD, and they are commented that they are a lot more versatile than those applicable to the SE.

⁴⁰ Bech Bruun/Lexidale, Study on the application of the Cross-Border Mergers Directive, pp.78

⁴¹ Ex post analysis of the EU framework in the area of cross border mergers and divisions, European Implement Assessment, Study, December 2016, pp. 46

⁴² Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees

Generally, when a cross border merger is effected, the rights and obligations arising from the contracts of employment of the transferor companies are transferred to the successor company⁴³

The guidelines overseeing representative interest in the successor organization might be concurred between the exceptional arranging body and the administration or authoritative organs of the transferor organizations. Should no agreement be reached within a half year, the Standard Rules (as set out in Schedule 1 of the CBM Regulations) will apply.

Where representative participation rights do exist, the Regulations give that the transferor companies can either concur to enact new rules in connection to participation rights or on the other hand they can embrace the default position of the Standard Rules.⁴⁴

4. Creditors protection on cross – border mergers

As all benefits and liabilities are being exchanged, legitimate mergers may give rise to dangers for creditors of the absorbed corporation when the liabilities of the absorbing organization surpass the resources of the absorbed organization or for creditors of the absorbed corporation when the liabilities of the absorbing organization surpass the advantages of the absorbing company. Along these lines, creditors' protection should be shielded in lawful mergers. 'Since the corporate frame characterizes the pool of advantages that security every corporate get, all gatherings who contract with partnerships profit by lenders' security. Distinctive national frameworks of creditors' assurance might be a hindrance for a smooth merger process and may make vulnerabilities. The inquiry thusly is whether a creditors' protection should be dealt with by the Member States.⁴⁵

As demonstrated, the European lawmaker has left the particular insurance of creditors' rights to the Member States. The European Council and the European

⁴³ Article, "Cross – Border mergers", June 2012, Matthew Ryan, Adrian Benson 'DILLON-EUSTAGE, LAW FIRM'.

⁴⁴ Ibid

⁴⁵ 'Raaijmakers, T.M.J, Olthoff T. PP.H, "Creditor protection in cross border mergers: unfinished business", Utrecht Law Review, 2008, pp.34

Parliament have demonstrated that the Directive should not impose further commitments on the Member States than is essential to serve its objective. The most important is that the directive must be adapted to the national law of the Member States, and not vice versa. In this regard article 4, section 1 (b) of the Directive, gives that, spare as generally gave in the Directive, an organization participating in a cross-border merger will agree to the arrangements and conventions of the national law to which it is subject. To strategically maintain a distance from any misconception, section 2 of that equivalent article provides that these arrangements and customs incorporate lenders' protection of the new created corporations. The main other arrangement of the Directive on lender security is in article 6, par.2 (c), where it is expressed that for every one of the consolidated companies and subject to the additional prerequisites imposed by the Member State to which the organization concerned is subject, a sign, for each of the merging companies, should be distributed in the national paper of the significant Member State of courses of action made for the activity of the privileges of creditors.⁴⁶

Upgrading security for creditors the CBMD presented or improved the protection of creditors' inter alia from the hazard of budgetary precariousness of the newly created company, in the event that the other company has obligations. More particularly, protective arrangements built up least criteria in terms of the substance of the draft terms and require that these terms are endorsed at the common assembly of the companies involved. The prerequisite to distribute these draft terms, in conjunction with the completion of the merger and the creditor's rights and the area where assist data can be found, furthermore points to the upgrading of protection

Particularly, in relation to protection of creditors Article 4(2) CBMD permits Member States to apply instruments that guarantee the security of lenders to the extent that these elements have already been implemented in national legislation. This protection decrease the chance that the lenders will be in a worse financial situation than they were recently before the merger, in case since the liabilities of the procuring

⁴⁶ 'Raaijmakers, T.M.J, Olthoff T. PP.H, "Creditor protection in cross border mergers: unfinished business", Utrecht Law Review, 2008, pp.37

company would surpass its resources⁴⁷, or in case the legal framework governing the consolidated company might adversely affect creditors⁴⁸. Usually the case, for example, with insolvency laws, where, under the European insolvency Control, the competent authority for insolvency procedures is decided by the registered location of the corporation and the center of primary interest, hence the move in area might permit shareholders to forum-shop based on insolvency laws, to the disservice of lenders. In understanding moreover with the household merger order for national mergers, 29 out of 30 states applying the CBMD have indeed chosen to implement the optional provision of the Directive relating to creditor protection, albeit with considerable divergence as regards the methods and forms of such protection.

The distinctions in the national laws relate basically to: a) the point in time when the security starts and its duration and b) the methodology and creditor assurance which is pursued, with everything taken into account bringing about what appears the making of superfluous multifaceted nature and vulnerability. 49

a) When does creditor insurance start, and to what extent does it last?

Based on Member States' attentiveness over when creditor's assurance starts, they can be separated into ex-risk and ex-post gatherings, contingent upon whether the lender insurance date starts prior to the general investors meeting, or following the same. In the former, the date compares to the production of the basic draft terms, while in the later, the date may change between the choice to converge by the general gathering of investors or the date on which the merger is legitimately closed⁵⁰. Issues with this framework emerge when an organization arranged in a Member State where the date begins after the general gathering works with an organization in another Member State where the date begins after the general gathering. In such occurrences it might be difficult to accommodate the diverse dates. Demonstratively, this is the situation when the merger testament has just been issued in one Member State

⁴⁷ "Raaijmakers, T.M.J, Olthoff T. PP.H, "Creditor protection in cross border mergers: unfinished business", Utrecht Law Review, 2008, pp.34

⁴⁸ Bech Bruun/Lexidale, Study on the application of the Cross-Border Mergers Directive, pp.52

⁴⁹ Ibid, pp.53

⁵⁰ Ibid, pp.53

however not in the other, while in the meantime a half year due date to record the enlistment ask for has started.⁵¹

Critical divergences between Member States additionally exist as to the length of lender assurance, with time periods extending from one month (as in the instances of Denmark, France, Greece and Hungary) to a half year (Czech Republic), or even with no particular date (Lithuania and the UK).⁵² Despite the way that most of Member States appears to restrain such insurance to one to two months⁵³, such contrasts in the term of leaser security improve vulnerability and might be considered as imperfect. This is again featured by the previously mentioned model where the merger endorsement has just been issued in one Member State however not yet in the other because of contrasts in appropriate leaser insurance rules, while the half year clock for recording the enlistment is as of now ticking.

b) Procedural contrasts in lender security instruments

The transcendent methods for accomplishing creditor's insurance is by requiring 'creditor security.' With this methodology, which is trailed by 29 out the 30 states applying the CBMD⁵⁴, lenders can ask for that the organization gives security as an assurance of obligation installment as a precondition to a merger⁵⁵. Notwithstanding some basic qualities of the 'creditor security' show pursued by the 29 states, various procedural contrasts exist.

Most altogether, there are contrasts between the Member States in the kind of power that settles on whether security should be given. For a part of Member States, a legitimately restricting choice is conveyed by a courtroom. For the other part an authoritative choice is passed on by the national (organization) registry. Instances of nations having a place with the first part are the Czech Republic, France, Luxembourg, Poland, Portugal, and Slovakia, though Finland, Norway and Sweden include in the second part.

⁵¹ See Article 11(2) CBMB

⁵² Bech Bruun/Lexidale, Study on the application of the Cross-Border Mergers Directive, pp.54

⁵³ Ibid, pp. 55

⁵⁴ Ibid, pp. 55 The only exception is Iceland

⁵⁵ Ibid, pp. 56

With respect to the creditor security system, some Member States have granted lenders *veto rights*⁵⁶. Typically, this alternative is particular of the 'ex-ante' way to deal with creditor protection, under which lenders practice their entitlement to square or postpone mergers including their account holders, and may defer any merger until their rights have been defended. This model gives sureness to creditors in advance, yet the drawback is that there is space for creditors to unduly mishandle the method by blocking or deferring it⁵⁷. Then again, with the 'ex-post' framework, creditors are required to maintain their rights with the newly created company because of the merger, which likely could be based somewhere else in the Union, and they can't square or postpone the merger. This model organizes the versatility of organizations inside the EU, in spite of the fact that the interests of creditors are apparently less secured⁵⁸.

In order to understand the above, I will quote the following case example.

A theoretical merger between a Dutch and an Italian organization features the intricacy and the trouble which would be related to veering lender insurance frameworks: The Netherlands applies an *ex-risk* framework in which creditors can request security before the merger if the banks' cases are not adequately secured. The lenders may express their opposition to the merger in writing at the able locale court, and demand an extraordinary type of security. Creditors have one month to do as such after the merger has been declared in the national court. Besides, creditors may obstruct the merger on the grounds that the notarial deed can't be executed. As needs be, the merger would be obstructed until the restriction had been pulled back or the court judgment expelling that the notarial deed out to be enforceable. From the other hand, in Italy, an *ex-post* framework appklicable, and a merger is suspended for 60 days, except if one of the accompanying three conditions is satisfied: a) the lenders agreed to the merger; b) all non-consenting creditors have been separated from the required funds, or; c) the total amount to be paid by the lenders who disagree has

⁵⁶ Bech Bruun/Lexidale, Study on the application of the Cross-Border Mergers Directive, pp.55/14 Member States have granted veto rights to creditors, while 15 expressly did not.

⁵⁷ Ibid, pp. 59

⁵⁸ "Raaijmakers, T.M.J, Olthoff T. PP.H, "Creditor protection in cross border mergers: unfinished business", Utrecht Law Review, 2008, pp.37-38

been saved in a bank as collateral for their credit. In those days, lenders can basically hinder the merger. Along these lines, on account of a cross-border merger including substances in both the Netherlands and in Italy, counselors don't just need to handle complex creditor's security frameworks, but they additionally need to aggregate the two statutory periods since the one is ex-post and the other is ex-risk. At long last, in the two nations (Netherlands and Italy) lenders can obstruct the merger, prompting conceivably long deferrals and vulnerability.

In addition, there are various explicit security plans, accommodated in various Member States, for example, in a few nations, for example, *Denmark*, a direct assurance is based on an evaluation report.⁵⁹ In *Norway*, mergers of business banks or insurance agencies may enable the investor to end the record of the protection agreement⁶⁰. In *Poland*, if the subsequent organization is situated in Poland, the advantages and liabilities of the newly created companies must be overseen independently the total amount needed by the creditors has been accumulated ⁶¹. Finally, in *Estonia*, security is just accessible if the newly created company is administered by the law of an alternate Member State⁶².

The degree of diversity in creditor protection practices between Member States is therefore remarkable, rendering unnecessary complexities and legal instability. A higher level of study in relation to (a) the point at which creditors' protection starts (and their length) and (b) the system and method of assurance will probably solve a large part of the above challenges.

As to which assurance system is best as far as amplified viability, the Member State lawmakers and actualizing specialists might need to move far from granting a veto directly to the creditors of a company. To be sure, veto rights may appear to be unnecessary in perspective of the way that the lender's monetary advantages can be esteemed as adequately ensured by the directly to acquire security for their cases, in accordance with the assurance standard as of now set down in the Domestic Merger

⁵⁹ Bech Bruun/Lexidale, Study on the application of the Cross-Border Mergers Directive, pp. 57

⁶⁰ See Article 31(1) and (2) of the Act of 24 May 1961 no 2 on Commercial Banks in Norway and Article 13-1(1) and (2) of the Act of 10 June 2005 no 44 on Insurance Companies and Pension Funds (Norway)

⁶¹ See Articles 495 AND 496 CPCC(Poland)

⁶² See Articles 433 of the CC(Estonia)

Directive (Articles 13 and 14). Arguably, the ex-post insurance framework can accommodate a sensible period (of for example a half year) after the merger has produced results for the creditors to hold up their demand to get security (as an obligation installment ensure), without postponing or stopping cross-border mergers. In this regard, it ought to be noticed that authorizing claims abroad isn't really unreasonably troublesome for banks in perspective of the way that the Brussels II Regulation guarantees that cases can be upheld all through the EU. In the option of deciding on an ex-ante assurance framework, the insurance time frame ought to be exceptionally short so as to limit the hazard that creditor's security would extensively postpone the merger procedure or even stop the whole merger. Interestingly, while noting the inquiry from the European Commission on the point in time at which creditors from the newly created company should start to be secured, respondents of the Commission's Feedback Statement made a point for an ex-ante point in time (before a cross-border merger produces its results): the respondents, in any case, focused on that such an ex-ante assurance period should not obstruct the merger.

5. Protection of creditors as an unfinished business

On 10 July 2007, the Commission embraced its communication on a streamlined business condition for companies in the zones of company law, bookkeeping and reviewing. In this communication, the Commission set out its proposition for decreasing authoritative weights and adjusting the *acquis* in these territories to the requirements of the present business which were embraced by the Competitiveness Board on 22 November 2007⁶³. The Competitiveness Council showed that it inclines toward that prior as far as possible of 2008 and that the recommendations dependent on effect appraisals are brought forward⁶⁴.

⁶³ Council document 15222/07 DRS 48

⁶⁴ Synthesis of the reactions received to the Commission Communication on a simplified business environment for companies in the areas of company law, accounting and auditing (COM(2007) 394), report from the Internal Market and Services Directorate-General dated December 2007.

The communication from the Commission proposed two choices for future European company law. The primary choice respected the cancelation of directives, for example, the Third, the Sixth, the Twelfth directives, and, subject to the result of an outside investigation on the present capital support framework, the Second Directive. The second alternative comprised in the proposition to improve at any rate some portion of the Third, the Sixth and presumably likewise the Second Directive as these directives, in their present frame, leave the Member States little adaptability to adjust their individual national frameworks to the advancing needs of business and partners. A reasonable greater part of the respondents to the correspondence of the Commission were agreeable to the second alternative.

In any case, as for the Second Directive, most of the respondents remarked that they might want to anticipate the aftereffects of an outside examination on the assessment of the possibility of an option in contrast to the present routine of legitimate capital set up by the second Directive. It contains an outline of the capital support in five Member States and in four non-Member States. It further examines the different proposition as to capital support, for example, the Winter report⁶⁵. This examination was finished and as of late published⁶⁶.

The Commission issued an activity plan with as essential objectives i) the upgrade of the privileges of investors and security for workers, lenders and different gatherings required with organizations whereby the standards concerning corporate administration will be corrected and ii) increment of the effectiveness and the aggressiveness of the business world whereby particularly certain cross-border issues must be tended to.

On 6 September 2006, the Commission embraced a Directive on the correction to a few articles of the Second Directive which must be followed by 15 April 2008.⁶⁷ This Directive builds up the conditions that must be fulfilled so as to guarantee that the capital of the organization is kept up in light of a legitimate concern for creditors and pursues various proposals made by the High Level Group, including the procurement

⁶⁵ Report of the High Level Group of Company Law Experts on a modern regulatory framework for company law in Europe, Brussels, 4 November 2002.

⁶⁶ Raaijmakers, T.M.J, Olthoff T. PP.H, "Creditor protection in cross border mergers: unfinished business", Utrecht Law Review, 2008, pp.38

⁶⁷ Directive 2006/68/EC.

of offers through commitments in kind and the procurement by its very own organization shares. Likewise, the present decides on budgetary help that a company can give for the obtaining of its offers by a third party will be loose.

Following the above mentioned, it appears that the case for leaving the protection of creditors to the Member States is debilitating. Despite the fact that there are contentions for different frameworks of lender security, eventually the shield on this issue, which is implemented in national law, is a matter of specialized nature which ought to in my view not prevent the efficient operation of the single window display.

There are solid contentions, as it were, to embrace similar arrangements for all exchanges for straightforwardness. It is promising that the European Commission plans to embrace uniform creditors insurance rules demonstrated after Article 32 of the corrected Second Directive. In the occasion of a decrease of the bought in capital, at any rate the creditors whose claims predate the production of the choice on the decrease will in any event have the directly to acquire security for claims which have not fallen due by the date of that distribution. Member States may not set aside such a privilege except if the creditor has sufficient protections, or except if such defends are most certainly not essential having respect to the advantages of the organization. We have some uncertainty whether this approach will take care of the whole issue, as regardless it leaves space for contrasts in national enactment. What is imperative, regardless, is the desire to go to a blended arrangement of loan boss assurance⁶⁸.

For the time being, in any case, the disillusioning end is that the objective of the Directive has not yet been cultivated. In cross-border mergers, bank insurance, in my view, is essential to encourage a smooth, effective and straightforward procedure important to similarly encourage the single advertise. Contrasts in national enactment on creditors' security, defensible as they might be, are of a specialized sort and make pointless and unmerited obstructions. The aspiration detailed by the Winter Group to come to uniform principles for 'all rebuilding exchanges' is alluring, yet can prompt undesired deferral. Nonetheless, changing the Directive now in time appears to be similarly unfeasible. We would close in this manner that this burdens the need to at

⁶⁸ Raaijmakers, T.M.J, Olthoff T. PP.H, "Creditor protection in cross border mergers: unfinished business", Utrecht Law Review, 2008, pp.38

least make scurry with further harmonization of loan loss security in the Third Directive⁶⁹.

For the time being, in any case, the baffling end is that the objective of the Directive has not yet been completed. In cross-border mergers, lender insurance, is critical to encourage a smooth, proficient and straightforward process important to similarly encourage the single advertise. Contrasts in national enactment on lender assurance, defensible as they might be, are at last of a specialized sort and make superfluous and baseless obstacles. The aspiration figured by the Winter Group to come to uniform tenets for 'all rebuilding exchanges' is alluring, yet can prompt undesired deferral. Be that as it may, correcting the Directive had been unfeasible⁷⁰.

⁶⁹ Raaijmakers, T.M.J, Olthoff T. PP.H, "Creditor protection in cross border mergers: unfinished business", Utrecht Law Review, 2008, pp.38

⁷⁰ *ibid*

Chapter 4th : The need to enhance legal certainty and predictability on members' and creditors' protection and disclosure rules in the existing Directive.

The EU economy needs sound and thriving companies which can, without much of a stretch, work in the Single Market. The Directive (EU) 2017/1132 of the European Parliament and of the Council regulates including cross-border mergers of limited liability companies. These rules represent a significant milestone in improving the functioning of the Single Market for companies and firms and to exercise the freedom of establishment. However, evaluation of these rules shows that there is a need for modifications in cross-border merger rules. To accomplish a merger, companies need to work in a lawful and managerial condition. This condition is both helpful for development and adjusted to confront the new monetary and social difficulties of a globalized and advanced world, while seeking after additionally other real open interests, for example, the insurance of employees, creditors and minority shareholders and giving experts in order to guarantee their protection against distortions.

1. Why there is a need to overhaul the existing Directive on cross-border mergers in order to enhance its working.

It is with this target the Commission is advancing a proposition for a Directive of the European Parliament and of the Council changing Directive (EU) 2017/1132⁷¹ as regards cross border transformations, mergers and divisions.

Corporate restructurings and changes, for example, cross-border transformations, mergers and divisions, are a piece of companies' life-cycle and speak to a characteristic route for organizations to develop, adjust to a changing situation and investigate openings in new markets. In the meantime, they likewise involve ramifications for organizations' partners, specifically for employees, creditors and shareholders. Subsequently, it is fundamental that the insurance of partners keeps pace with the

⁷¹ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law OJ L 169, 30.6.2017, pp. 46.

regularly developing trans-nationalization of the corporate world. Indeed, today the legitimate vulnerability, incomplete deficiency and furthermore the absence of tenets overseeing certain cross-border tasks of organizations implies that there is no reasonable system to guarantee powerful security of these partners. In this circumstance, the assurance offered to partners may consequently be ineffectual or deficient. The cross-border activities of organizations can likewise be encouraged by a legitimate situation that makes trust in the Single Market by accommodating protections against maltreatment⁷².

In this way, it is vital to release the capability of the Single Market by separating hindrances to cross-border exchange, encouraging access to business sectors, expanding certainty and animating challenge while offering viable and proportionate insurance to partners. The target of this proposition is double: give explicit and exhaustive methodology to cross-border transformations, divisions and mergers to encourage cross-border portability in the EU while, in the meantime, offering organization partners sufficient security so as to shield the decency of the Single Market⁷³.

As of now, companies wishing to move their enlisted workplaces cross-border need to depend on Member States' laws. Such laws, where they exist, are regularly inconsistent or hard to join with one another. This likewise implies the security of partners, for example, employees, lenders or minority investors is regularly ineffectual or inadequate because of the absence of guidelines. As respects worker assurance, without shields of protection for representative investment rights, organizations may utilize a cross-border transformation. The absence of important protections for worker support rights, when moving to another Member State, could bring down the dimension of cooperation⁷⁴.

The portability of organizations must run connected with the assurance of national social and work law privileges. In light of the prior contemplations, the principle targets of the blended tenets for cross border mergers are double: - empowering small and

⁷² The proposal of the European Parliament and the council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, Brussels 25.4.2018, COM(2018) 241 final, pp. 1-3

⁷³ Ibid, pp. 1

⁷⁴ Ibid

medium – sized enterprises, in order to change over cross-border in a deliberate, proficient and viable way; - securing the most influenced partners, for example, representatives, lenders and investors in a reasonable and proportionate way. The proposition would empower organizations to change over cross-border by changing their authoritative document of one Member State into a comparable authoritative document of another Member State.

The introduction of the Cross-Border Merger Directive set out a fit method at EU level for constrained obligation organizations. It prompted a significant increment in cross-border merger movement in the EU and EEA. The quantity of cross-border mergers ascended by 173% somewhere in the range of 2008 and 2012, which demonstrates that *the methodology set up by the Directive generously upgraded cross-border movement*. Partners, (for example, law offices, business registers and worker's organizations) met for the 2013 investigation on the utilization of the Directive respected the new methodology, the procedural rearrangements and detailed lower costs and shorter time spans on account of the blended structure. Be that as it may, regardless of the general positive appraisal, the assessment of the working of the Cross-Border Merger Directive recognized certain issues which obstruct the full viability and proficiency of the current tenets⁷⁵.

The 2015 Single Market Strategy referenced vulnerabilities over organization law as one of the obstructions that SMEs grumble about in the Single Market and declared that the Commission would "analyze the need to refresh the current principles on cross-border mergers and the likelihood to supplement them with guidelines as respects cross-border divisions".

The European Parliament focused on the *beneficial outcomes of the Directive which has encouraged cross-border mergers between restricted risk organizations in the European Union and decreased the related expenses and authoritative techniques*. Notwithstanding, the European Parliament likewise noticed the need to overhaul it so as to enhance its working⁷⁶.

The fundamental distinguished deterrents concern the absence of harmonization of substantive guidelines specifically for lender assurance and minority investor

⁷⁵ Ibid

⁷⁶ Ibid, pp. 4

security just as the absence of quick track (for example improved strategies for less "complex" mergers). It has additionally been reprimanded that workers are not adequately educated about the subtleties and ramifications of a cross-border merger. These wasteful aspects were affirmed by partners all through the counsel procedure. Concerning the assurance of creditors and minority investors, the current principles on cross border mergers set down least, fundamentally procedural standards and leave the substantive insurance to national laws⁷⁷.

Hence, the contrasts between Member States laws hold on. For instance, the Directive just sets out that creditors will be secured subject to national tenets which are moving along without any more particulars. Also, the Directive sets out a few tenets concerning investors as a rule (for example data through the draft merger terms, master reports, casting a ballot amid the general gatherings), however it abandons it to Member States to choose whether to present further assurance for minority investors. With regards to the worker support on board level, the current guidelines set out a thorough system. As of now, the circumstance of workers is just considered in a general way in the administration report tended to dominatingly to investors. This proposition expects to address these weaknesses. It gives orchestrated standards to security of creditors and investors. The organization would need to give the appropriate insurance of lenders and investors in the draft terms of the cross-border change. The creditors who might be disappointed with the assurance offered, may apply to the fitting managerial or legal expert for more sufficient protections. Lenders of the combining organizations should be assumed not to be biased by a cross-border merger, if an autonomous estimator evaluated their circumstance and considered no partiality or that the creditors were offered a directly to installment, either against an outsider underwriter, or against the newly created company because of the merger⁷⁸.

Investors who did not vote in favor of the cross-border mergers or have no voting rights would have the opportunity to leave the organization (discard their offers) and get the sufficient pay. In addition, Member States should likewise guarantee that shareholders of the merging companies who did not restrict the cross-

⁷⁷ Ibid, pp. 6

⁷⁸ Ibid

border merger, but rather who thought about that the proposed offer trade proportion was lacking, may test that proportion set out in the basic draft terms of the cross-border merger under the watchful eye of a national court. Moreover, the proposed standards guarantee that representatives will be appropriately educated about the ramifications of the arranged cross border merger on workers⁷⁹.

There is no fit legitimate system for cross-border divisions of organizations, in spite of the fact that divisions likewise assume an imperative job in the financial condition of Member States. The present EU legitimate structure gives administrators just to cross-border mergers of organizations, while cross-border divisions are liable to national tenets if such guidelines exist.

This piece of the proposition means to present another lawful system directing cross-border divisions. Its fundamental target is to deliver matters identified with cross-fringe portability by making it less demanding for any restricted obligation organization to almost certainly partition cross-border.

The arrangements identifying with cross-border divisions are enlivened by the current structure of the cross-border merger mandate just as the current standards for local divisions. The tenets are adjusted to provide food for a circumstance where an organization is part rather than where at least one organizations exchange every one of their advantages and liabilities to another organization. In the meantime, the goals of the blended standards on cross-border divisions stay like cross-border transformations: a) empower organizations to partition cross-border in a systematic, productive and successful way; b) secure the most influenced partners, for example, workers, lenders and investors in an appropriate and proportionate way⁸⁰.

The proposal for a new directive will supplement and correct the current guidelines on EU organization law that are presently systematized in Directive (EU) 2017/1132. It expects to change the current principles on cross-border mergers and to give an appropriate and clear legitimate system for companies which are interested in separating or exchanging their enlisted office cross-border. From a procedural viewpoint, the proposed principles are completely intelligent with the current

⁷⁹ Ibid

⁸⁰ Ibid, pp. 8

guidelines going for encouraging cross-border movement by organizations through cross-border mergers.

2. The amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions

The proposal for the amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions depends on Article 50 of the Treaty on the Functioning of the European Union (TFEU) which is the lawful reason for the EU skill to act in the region of company law. Specifically, Article 50(2) (f) accommodates dynamic cancelation of limitations on opportunity of foundation and Article 50(2) (g) accommodates coordination measures concerning the assurance of interests of organizations' individuals and different partners. The proposal creates a uniform procedure to facilitate these transactions while at the same time protecting the rights of minority shareholders, creditors and employees.

The proposition presents another legitimate structure for a strategy of cross-border changes and divisions of constrained liabilities companies. The ex-post assessment of the current Cross Border Mergers Directive⁸¹ was done against the assessment criteria in accordance with "better-regulation" necessities. The investigation brought about a general positive assessment of the Cross-Border Merger Directive as far as adequacy, productivity, pertinence, intelligibility and EU included esteem. By and large, the Cross-Border Merger Directive has prompted a noteworthy increment in the cross-border merger action, in accordance with its target to encourage cross-border mergers and increment the open doors offered by the Internal Market.

The fundamental impediments concern the absence of harmonization of substantive standards specifically for creditors' protection and shareholders' insurance just as the absence of quick track (for example improved) strategies in the Directive.

⁸¹ Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross border mergers of limited liability companies (OJ L 310, 25.11.2005, pp. 1); the directive has now been replaced by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) (OJ L 169, 30.6.2017, pp. 46)

Making more utilization of the interconnection of business registers could expand cooperative energies and in this manner cognizance with other organization law enactment. This proposition is well known and expects to deliver the principle inadequacies to the current cross-border merger rules which distinguished in it.

The Impact Assessment Report covering digitalization, cross-border activities and struggle of law governs in organization law, was inspected by the Regulatory Scrutiny Board on 11 October 2017⁸². The suggestions set forward in an amended form by the Impact Assessment submitted to the Board on 20 October 2017. The Board gave a positive feeling with reservations on 7 November 2017.

Concerning the extent of utilization which would figure out which kinds of organizations could profit by the blended tenets and techniques for cross-border transformations and divisions and changed principles on cross-border mergers, the Impact Assessment clarified why the current extent of use of the cross-border merger rules (for example limited liability companies) gives the best answer for all cross-border tasks regardless of a few calls to expand it to cover associations and helpful.

With regards to the presentation of new procedural principles for cross-border transformations and divisions, the Impact Assessment analyzed the choice of having no procedural standards for cross-border changes and divisions against the choice which would acquaint fit EU strategies with empower organizations to do coordinate cross-border changes and divisions. The absence of procedural guidelines makes cross-border changes and divisions incredibly troublesome, if certainly feasible. National cross-border change and division methods exist just in a predetermined number of Member States and they are frequently not line up with one another. Organizations should in this manner depend on exorbitant backhanded methodology, the comparable to utilization of the Cross-border Merger Directive and the CJEU statute where legitimate experts and business registers know about the case-law. By presenting new procedural guidelines for cross-border changes and divisions, the organizations would be given a critical overview and moreover deal an essentially decrease of the expenses for companies wishing to change over or isolate cross borders. In addition, it would give clearness to national business registers to plainly

⁸² Impact Assessment and Opinion of the Regulatory Scrutiny Board is available at: <http://ec.europa.eu/transparency/regdoc/?fuseaction=ia&year=&serviceld=10226&s=Search>

recognize the point so as to which an organization can enter the business enlist in the goal Member State and be struck off the business enroll in the other Member State which would maintain a strategic distance from circumstances, for example, Polbud⁸³.

With regards to the security of creditors, the Impact Assessment analysed the alternative of keeping the current cross-border mergers rules unaltered and no EU runs on creditors insurance in cross-border changes and divisions against the choice of giving orchestrated guidelines to ensure lenders and against that would accommodate indistinguishable blended standards from the main choice, yet Member States would most likely accommodate extra defends. The favoured second alternative would give the best harmony between cost decrease, an abnormal state of assurance and adaptability to Member States. Both these alternatives would altogether lessen cost and weights on organizations in contrast with the gauge situation, as the orchestrated standards on bank insurance would accommodate progressively lawful assurance and less requirement for legitimate guidance for any cross-border activity. The main choice would offer the greatest investment funds for organizations, while reserve funds in the second choice may be littler, since Member States could accommodate extra defends which could be expensive or difficult for a few organizations (for example need to give certifications to all leasers). As far as insurance offered to creditors, the second choice would accommodate more total and focused on security than the first because of the likelihood conceded to MS to evaluate the national specificities of lender assurance and to present more protects⁸⁴.

With regards to the worker data, conference and interest, the Impact Assessment thought about the alternative (pattern situation) of applying the current principles on the representative support in the Cross-border Merger Directive against the choice 1 that would apply the current standards on the representative investment in loads up from cross-fringe mergers to cross outskirts divisions and transformations and against choice 2 that would comprise of focused changes to existing cross-outskirt mergers rules, while in the meantime giving explicit measures to the apparent higher dangers for representatives in cross-outskirt divisions and transformations. The preferred

⁸³ Polbud – Wykonawstwo C-106/16

⁸⁴ The proposal of the European Parliament and the council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, Brussels 25.4.2018, COM(2018) 241 final, pp. 19

option 2 is composed of several elements which as a combined effect aim to provide the necessary protection for employees. Safeguards would include for all cross-border operations a new special report prepared by the company's management to describe the impact of the cross-border merger on jobs and the situation of employees and a so called "anti-abuse" rule providing that during 3 years following the cross-border operation, if performing a subsequent cross-border or domestic operation, the company would not be able to undermine the system of employee participation. The rule is based on the existing cross-border mergers rules but would be adapted to cover not only subsequent domestic conversions, mergers or divisions but also other cross-border and domestic operations. This option would, in addition introduce specific rules as regards negotiations in case of cross border divisions and conversions. The Impact Assessment analysed the costs and benefits of these targeted changes and concluded that the limited additional compliance costs for companies due to the possible preparation of the report would be outweighed by the increased protection of employees and the resulting societal benefits⁸⁵.

The proposition is relied upon to convey significant disentanglement advantages to business in the Single Market by encouraging cross-border portability of organizations. The production of a far reaching set of normal guidelines controlling cross-border changes and divisions will streamline and rearrange systems and diminish costs for business as respects the sort and substance of reports to be readied, the diverse methodology and the related due dates or other extra necessities. The proposed principles on representative interest and individuals' and creditors' insurance standards will upgrade legitimate assurance and consistency to these tasks. The new regular principles on cross-border divisions and changes can be required to bring funds of EUR 12 000 - EUR 37 000 (divisions) and EUR 12 000 – 19 000 (transformations) contingent upon the span of organizations and Member States included.

3. Critical overview for the above issues.

⁸⁵ Ibid, pp. 20-21

In my opinion, the protection of employees and creditors should be a primary issue in the process of completing a merger.

In order to ensure a minimum equivalent protection for both employees and creditors of public limited liability companies, it is particularly important to harmonize the national provisions on the formation of these companies.

I believe that is an extremely positive advancement for the internal market that both national and cross-border mergers are directed at EU level. The way that private companies as well as public companies could participate in cross-border mergers does not confine the advantages of freedom of establishment.

The negative focuses should not affect the general positive effect of the Cross-border Mergers Directive, but of course as it has already been decided, it is necessary to amend and supplement it. The resulting company is a national law company and in this way, I believe that it isn't affected by the obscurities of the SE Statute. It is obvious that the Cross-border Mergers Directive also embraces companies with no head office in the Community and prescribes a very relaxed cash balance requirement if any Member State allows it, allowing transactions similar to public offers of shares.

Conclusions

Having developed all the above issues in detail, becomes evident that the European legislator has to illuminate and change the lawful structure in domain, in order the support to be directly shielded. Such an enhancement of the juridical standards will support the cross-border mergers of companies and will ensure their freedom of establishment.

As far as the protection of the employees is concerned, in the merger methodology, it should clearly be separated from investment of workers in the groups of the procuring or recently established companies. It happens in each cross-border merger, no matter what the "nationality" of blending organizations is, enlisted seat of the securing or recently established organization or the quantity of workers. Worker rights in the merger procedure principally envelop data rights. A business is committed to give a merger plan to worker agents or, in their nonappearance, to all representatives (which will address the imaginable impacts of the merger on representatives), a specialist assessment on the arrangement (except if such feeling isn't drafted following a choice of investors of the blending organizations). In addition, a fiscal report is necessary and the executives board need to provide details regarding movement of the consolidating organizations amid the three going before business years together with an inspector sentiment and report, just as an administration load up articulation illuminating legitimate and monetary parts of the merger. In the event that the body drafting a report gets a sentiment of representatives on the merger at a proper time, it ought to likewise be added to the report.

On the other hand as far as the protection of creditors is concerned, the Member States should, in any event for mergers of public limited liability companies, guarantee sufficient security of the interests of the creditors consolidating organizations whose claims emerged preceding distribution of the draft terms of merger what's more, which are not due at the season of distribution. These creditors will be qualified for satisfactory shields if the monetary circumstance of the combining organizations renders such assurance vital and in the event that they don't as of now advantage from such protects. The protection of those creditors may be in contrast to the insurance offered to lenders of the ingested companies.

However the need for a common strategy is without a doubt a vital advance towards a typical market in which national law won't almost certainly anticipate companies from moving starting with one state then onto the next as they work together. There is in reality no reason not to permit cross-border mergers when an absolutely local merger is conceivable.⁸⁶ The amending Cross-Border Merger Directive makes this probability a reality.

⁸⁶ "Cross – Border mergers in Europe", Volume I, General Editor Dirk Van Gervern, Cambridge.

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